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Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO 22–780 OF 2010
LIM CHONG FONG JC
18 MARCH 2014

Contract — Collateral contract — Existence of — Whether evidence showed collateral contract existed — Whether defendant failed to prove allegations of late delivery of goods and non-conformance with specification — Whether defendant's counterclaim baseless for seeking refund of all monies paid after having derived benefit of goods supplied by plaintiff — Whether defendant estopped from denying debt due to plaintiff based on own written acknowledgement of same

The plaintiff's instant claim against the defendant was for the balance of USD229,500 unpaid under a contract to design, calculate, test, supply and deliver test and LP separators to the defendant in addition to USD350 for the supply of an additional product that was ordered. In resisting the claim and raising a counterclaim, the defendant contended that (i) its liability to pay the plaintiff had not arisen because there was a collateral agreement between the parties that the defendant would pay the plaintiff only if it received payment from another party ('Ramunia Fabricators') from whom it had secured a subcontract to provide the test and LP separators; (ii) the separators were supplied late and did not conform to the contract specifications entitling the defendant to raise a set-off against any payments due to the plaintiff; and (iii) the plaintiff had failed to submit the requisite documentation to support its claim for final payment.

Held, allowing the claim and dismissing the counterclaim:

(1) The 'back to back' contract or 'pay when paid' arrangement alleged by the defendant was unsustainable. The collateral agreement alleged by the defendant was an attempt to argue there was a variation to the payment terms in the supply contract during the tail end of its performance. The variation, however, had to be supported by valuable consideration. In this case, the time for payment by the defendant had allegedly been postponed without any benefit accruing to the plaintiff. Hence, the collateral contract, if any, was void for want of consideration under s 26 of the Contracts Act 1950 (see paras 9–10).

(2) The defendant's allegations of late delivery and non-conformance with specification were bare assertions and were not cogently proven. No evidence of loss suffered by the alleged late delivery was adduced nor were

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delivery orders or relevant punch list or non-conformance reports on the separators tendered at the trial to substantiate the allegations (see paras 11 & 14–15).

(3) The defendant's counterclaim for USD 535,000 was for the refund of monies already paid to the plaintiff. In effect, it was a claim in restitution and not for compensatory damages for breach of contract. A restitutionary claim might be permissible in a case where there was total failure of consideration. The defendant could not, however, deny that it had derived benefit from the separators supplied by the plaintiff after having used them for the purposes of the defendant's contract with Ramunia Fabricators (see para 15).

(4) In its letter dated 4 August 2008 to the plaintiff, the defendant acknowledged that based on its accounts the amount due to the plaintiff was USD229,500 and that the defendant would make full settlement on resolving its issues with Ramunia Fabricators. There was no mention in that letter of outstanding final documentation required from the plaintiff. By that written acknowledgement, the defendant had waived, or was estopped from, insisting for final documentation as a condition precedent to paying the plaintiff on its invoice (see paras 19–20).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk baki wang sebanyak USD229,500 yang belum dibayar di bawah kontrak untuk mereka, mengira, menguji, membekal dan menghantar pemisah 'Test' dan 'LP' kepada defendan dalam tambahan kepada USD350 bagi pembekalan produk tambahan yang dipesan. Dalam membantah tuntutan dan membangkitkan tuntutan balas, defendan berhujah bahawa (i) liabilitinya untuk membayar kepada plaintif tidak berbangkit kerana terdapat perjanjian kolateral di antara pihak-pihak bahawa defendan akan membayar plaintif hanya jika ia menerima bayaran daripada pihak lain ('Ramunia Fabricators') di mana ia telah mendapatkan subkontrak untuk memperuntukkan pemisah *Test* dan LP; (ii) pemisah-pemisah tersebut lambat dibekalkan dan tidak mengikut kepada spesifikasi kontrak memberikan hak kepada defendan untuk membangkitkan penyelesaian terhadap apa-apa bayaran yang kena dibayar kepada plaintif; dan (iii) plaintif gagal untuk menyerahkan dokumen yang diperlukan untuk menyokong tuntutannya untuk bayaran akhir.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas:

(1) Kontrak 'back to back' atau pengurusan 'pay when paid' yang didakwa oleh defendan tidak dapat dipertahankan. Perjanjian kolateral yang didakwa oleh defendan adalah percubaan untuk menghujah bahawa terdapat variasi kepada terma bayaran dalam kontrak pembekalan semasa penghujung prestasinya. Variasi tersebut, walau bagaimanapun perlu

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disokong dengan pertimbangan bernilai. Dalam kes ini, masa untuk bayaran oleh defendan telah ditunda tanpa apa-apa faedah yang terakru kepada plaintif. Maka, kontrak kolateral, jika ada, adalah tidak sah kerana ketiadaan balasan di bawah s 26 Akta Kontrak 1950 (lihat perenggan 9–10).

(2) Dakwaan defendan mengenai penghantaran lewat dan tidak mengikut spesifikasi adalah dakwaan kosong dan tidak dibuktikan secara yakin. Tiada keterangan kerugian yang dialami akibat penghantaran lewat yang didakwa dikemukakan ataupun pesanan penghantaran atau 'punch list' yang relevan atau laporan ketidakpatuhan ke atas pemisah diserahkan pada masa perbicaraan untuk mengesahkan dakwaan-dakwaan tersebut (lihat perenggan 11 & 14–15).

(3) Tuntutan balas defendan untuk wang sejumlah USD535,000 adalah untuk bayaran balik wang yang telah dibayar kepada plaintif. Pada hakikatnya, ia adalah tuntutan dalam restitusi dan bukan untuk ganti rugi pampasan untuk kemungkiran kontrak. Tuntutan restitusi mungkin boleh dibenarkan dalam kes di mana terdapat kegagalan sepenuhnya terhadap pertimbangan. Defendan tidak boleh, walau bagaimanapun menafikan yang ia telah mendapat faedah daripada pemisah-pemisah yang dibekalkan oleh plaintif selepas menggunakannya untuk tujuan kontrak defendan dengan Ramunia Fabricators (lihat perenggan 15).

(4) Dalam suratnya bertarikh 4 Ogos 2008 kepada plaintif, defendan mengakui bahawa berdasarkan akaunnya jumlah yang perlu dibayar kepada plaintif adalah USD229,500 dan bahawa defendan akan membuat bayaran penuh dalam menyelesaikan isu-isunya dengan Ramunia Fabricators. Tidak terdapat penyataan di dalam surat tersebut mengenai dokumen akhir yang belum dibuat yang diperlukan daripada plaintif. Dengan pengakuan bertulis tersebut, defendan telah mengetepikan, atau diestop daripada, mendesak untuk dokumen terakhir sebagai syarat duluan untuk membayar plaintif atas invoisnya (lihat perenggan 19–20).]

Notes

For cases on existence of collateral contract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3779–3781.

Cases referred to

Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772, HC (refd)

Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 3 MLJ 349; [2009] 6 AMR 733, CA (refd)

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MP Factors Sdn Bhd v Suang Yan Projects Sdn Bhd & Ors [2007] 8 MLJ 602, HC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 AMR 1097, FC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16, FC (refd)

Legislation referred to

Civil law Act 1956 s 11
Contracts Act 1950 ss 26, 75
Rules of Court 2012 O 42 r 12

KC Ng (Soo Thien Ming & Nashrah) for the plaintiff.
Lynn Johnson (Chellam Wong) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a suit for contract payment in respect of the design, fabrication, supply and delivery of equipment for a marine platform in the oil and gas industry.

[2] The plaintiff is a Singapore incorporated company with expertise in marine engineering works. The defendant is a Malaysian incorporated company and secured a subcontract from a Ramunia Fabricators Sdn Bhd ('Ramunia Fabricators') to provide test and LP separators. These separators form part of the EPCC contract works relating to the East Belimut — a topside platform undertaken by Ramunia Fabricators for Newfield Peninsular Malaysia Inc.

[3] The trial was only a day. Besides the documentary evidence adduced in bundles marked B to D, the parties called Jason Yang Jian Sheng ('PW1'), the general manager of the PESP Division in the plaintiff company and Peng Joo Hock @ Dato' Amir Danial Abdullah ('DW1'), the managing director of the defendant company respectively as witnesses. After trial, the parties put in concurrent written closing submissions-in-chief and in reply.

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A BACKGROUND FACTS

[4] By a letter of award dated 22 January 2007 ('the supply contract'), the defendant awarded to the plaintiff the contract to design, calculate, test, supply and deliver of test and LP separators to the defendant at the price of USD765,000. The material terms of the supply contract are as follows:

Supplier's Obligations

[1.1] The Supplier's obligations and liabilities are as set out in this letter and all attachments hereto and the Supplier shall therefore assume and perform all the Contractor's obligations and liabilities to be evolved therefrom in connection to the supply of Materials herein described. The Supplier shall save harmless and indemnify the Contractor against all claims, demands, proceedings, damages costs, charges and expenses arising out of or in connection with any failure by the Supplier to perform his obligations under this Supply Contract or any default on the Supplier's part.

[1.2] The Supplier accepts full responsibility for the Materials to achieve full compliance with the requirements specified hereinafter:

(i) Specification No: NEWFIELD-A-1249/SPE/ME/111 rev.B dated 24.04.06.

(ii) Data Sheets:

a) Tag no. V-100 (Test Separator)

NEWFIELD-A-1249/DS/ME/111-1 (4 sheets) rev.B

NEWFIELD-A-1249/DS/ME/111-2 (1 sheets) rev.B

b) Tag no. V-110 (LP Separator)

NEWFIELD-A-1249/DS/ME/111-3 (4 sheets) rev.B

NEWFIELD-A-1249/DS/ME/111-4 (1 sheets) rev.B

(iii) Instruments Datasheets rev.B (52 pages)

(iv) Piping and Instrument Diagram

a) Test Separator- BEL-A-0104 rev.A dated 27.11.06

b) LP Separator- BEL-A-0105 rev.A dated 27.11.06

(v) Attachment I: Technical Clarification No. 1 dated 6.12.06

(vi) Attachment II: Scope of Work.

Supply Contract Price

[2.2] The above Supply Contract Price also includes:

(i) the cost of necessary mill certificates and documentation required by RAMUNIA FABRICATORS SDN BHD ('End User') and PCM Feam (M) Sdn Bhd ('Contractor')

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(ii) all the taxes & duties to be paid for all materials purchased for the Supply Contract and to be imported into Malaysia.

Delivery Date

[3.1] The Supplier undertakes to design, supply, test, pack and deliver the Materials exclude fabrication, testing, lining, material, calculation, painting and certification for pressure vessels to the Nilai Fabrication Yard Site within *21 weeks from this Letter of Award (i.e 18/6/2007) (hereinafter referred to as the 'Contractual Delivery Date'). And the fabricated/completed pressure vessels by OTHERS shall be delivered at Nilai Yard by 17th May 2007 or earlier to provide sufficient time for Oakwell to install/assembly all supplied material on the vessels. In the event of late delivery of the pressure vessels, the completion of the total skid packages will be affected accordingly to the number of days delayed. And the late delivery of the completed separator packages to the end user shall not be the responsibility of Oakwell.*

[3.2] In the event that the Supplier fails to deliver the Materials by the Contractual Delivery Date, then without prejudice to the Contractor's rights to be fully indemnified by the Supplier Contract, the Supplier shall be liable for and pay to the Contractor as Liquidated Ascertain Damages a sum equal to two percent (2%) of the Supply Contract value per week to a maximum of ten percent (10%) of the Supply Contract Value.

Terms of Payment

[4.1] Payment shall be made to the Supplier as follows:

(i) 10% upon approval of drawings.

(ii) 40% upon receipt of major materials at shop.

(iii) 40% upon delivery as per agreed INCOTERMS.

(iv) 10% upon submission of final documentation & clearance of punch list.

Payment by Irrevocable Letter of Credit, payable 'At Sight'.

All payment shall be subjected to receive of approved and substantiated invoices.

[5] The plaintiff delivered the separators to the defendant and accordingly invoiced the defendant. The invoices sent by the plaintiff were Tax Invoices No 1290 dated 9 April 2007 for the amount of USD76,500, No 1330 dated 29 May 2007 for the amount of USD306,000, No 1414 dated 14 September 2007 for the amount of USD306,000 and No 1614 dated 18 April 2008 for the amount of USD76,500 respectively in accordance with the milestones as prescribed in cl 4 of the supply contract. There was also a Tax Invoice No 1643 dated 16 May 2008 sent by the plaintiff to the defendant for the amount of USD350 for the supply of B1-metal thermometer requested by the defendant.

[6] The defendant has paid the plaintiff USD535,500 leaving a balance of USD229,850 which is claimed in this suit.

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A CONTENTIONS AND FINDINGS

[7] The defendant contended that the defendant was not indebted to the plaintiff by reason of a collateral agreement reached between the parties on 31 January 2008 that the defendant will only pay the plaintiff upon the defendant having received payment from Ramunia Fabircators. In other words, there was allegedly a 'pay when paid' arrangement. Furthermore, the defendant contended that the separators were also supplied late and did not conform to the supply contract specification and the defendant is thus entitled to set-off against any payment due to the plaintiff. The plaintiff denies both contentions of the defendant, in particular that the alleged collateral agreement could not apply to Invoice No 1414 dated 14 September 2007 since the defendant had already been correspondingly paid by Ramunia Fabricators on 10 August 2007. In fact the defendant had partly paid the plaintiff against that invoice.

[8] As to the allegation of the collateral agreement, the defendant relied on the testimony of DW1 which is supposedly supported by minutes of a tri partite meeting held on 31 January 2008. The meeting was attended by the representatives of the defendant, plaintiff and Ramunia Fabricators. The representative of the defendant was DW1. On scrutiny of the minutes, I do not however find there was such a pay when paid arrangement agreed between the plaintiff and the defendant as testified by DW1. The minutes merely show that the defendant will only submit to Ramunia Fabricators the final documentation relating to the separators after having received payment from Ramunia Fabricators. There is nothing whatsoever recorded as to payment arrangement between the plaintiff and the defendant.

[9] Be that as it may, the defendant went on to rely on the cases of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 and *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 to bolster its position on collateral contracts. These cases do not however support the defendant's proposition because the collateral contracts that subsisted in those cases were collaterally entered during the formation of the principal contract. I find and hold that the alleged collateral agreement was instead an attempt by the defendant to argue there was a variation to the payment terms in the supply contract during the tail end of the performance of the supply contract. The variation must however be supported by valuable consideration. This requirement for consideration is set out in the textbook *Chitty on Contracts* (Vol 1 — General Principles) (31st Ed), at para 22-035 that 'The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of the existing rights or the conferment of new benefits by each party on the other'. The time for payment by the defendant to the plaintiff in this case has allegedly been postponed without any benefit accruing

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to the plaintiff. In such premise, the collateral agreement, if any, is also void for want of consideration following s 26 of the Contracts Act 1950.

[10] Consequently, I find and hold that that the 'back to back contract' or 'pay when paid' arrangement as alleged by the defendant is unsustainable against the partly as well as the unpaid invoices of the plaintiff.

[11] In respect of the defendant's allegations of late delivery and non-conformance with specification resulting in valve leakages and malfunctioned transmitter, they are merely bare assertions of DW1 at the trial. In commercial transactions of present time, surely one would reasonably expect the allegations to be substantiated with documentary proof. As to the allegation of late delivery, there ought to be at least the production of the delivery order of the separators in court. Likewise for the allegation of non-compliance with specification, the relevant punch list or non conformance report of these separators must be produced. There was none tendered at the trial. The defendant alluded to a letter dated 4 August 2008 sent to the plaintiff but upon close reading of the letter, the substance was just unparticularised general allegation of issues pertaining to LD charges and back charge of outstanding works by Ramunia Fabricators on the defendant.

[12] The quality of the evidence required to prove allegations is still subject to the antiquated 'best evidence' rule. In the textbook *Phipson on Evidence* (17th Ed), it is stated in paras 7-40–7-43 that: 'The maxim that 'the best evidence must be given of which the nature of the case permits' was once treated as expressing the great fundamental principle upon which the law of evidence depends. Thus, Lord Hardwicke went so far to say that 'the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will permit'... In the present day, then, it is not true that the best evidence must, or may always be given, though its non-production may be a matter for comment, *or affect the weight of that which is produced ...*'. (Emphasis added.) Further it is stated at paras 42-10–42-11 that 'Extrinsic evidence is sometimes admissible to prove the existence as distinguished from the terms of some transaction or relationship which has been reduced to writing ... On the other hand, strict proof of a transaction of the document is sometimes required, though the terms thereof may not be in dispute. Thus, on a charge of perjury committed in proceedings before justices for refusing to leave licensed premises, the license must be produced, and oral testimony by the proprietor that he is licensed is inadmissible. So, the fact, that a person is rated to the relief of the poor can only be proved by the rate-book, or secondary evidence thereof and not by parol'.

[13] Consequently in civil litigation particularly construction type litigation, I am of the view that relevant documents that substantiate or support

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the oral allegations must be adduced at the trial where such documentary evidence is expected to be available in the ordinary course of business and commerce. Otherwise a reasonable explanation must be tendered to justify their non-production. In the absence of these documents or explanation of their absence, mere oral testimony is not weighty enough to overcome the burden of proving the allegations on a balance of probabilities. The requirement on adducing sufficient evidence beyond mere general assertion albeit even with particulars written down is seen in the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635 which was cited with approval by the Court of Appeal in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611 in relation to proof of damages. I see no reason why the same requirement will not apply to proving liability as well. It is thus for the defendant in this case to prove by adducing sufficient evidence that the separators were delivered late as well as non-conforming to specification as alleged and not for the plaintiff to prove otherwise.

[14] Besides proof of the allegation, the defendant's complaint of late delivery of the separators, if established, must necessarily be at the agreed rate as set out in cl 3.2 of the supply contract. Since this rate is a sum named in the supply contract to be paid in the event of breach, it is subject to reasonable compensation as prescribed in s 75 of the Contracts Act 1950. It was reaffirmed in *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 3 MLJ 349; [2009] 6 AMR 733 (FC) that the party seeking to recover compensation must prove actual loss in the ordinary way as explained in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 AMR 1097. There is not an iota of evidence of loss adduced by the defendant in this respect.

[15] In the premise, I reject the defendant's complaints both for late delivery and non-conformation of the separators with the specification because these allegations are not cogently proven. It follows that the counterclaim of the defendant must necessarily fail. Moreover, it is seen that the nature of the defendant's counterclaim for the sum USD535,000 is premised on refund of monies already paid to the plaintiff for the separators. In effect, it is a claim in restitution and not compensatory damages for ordinary breach of contract. A restitutionary claim may be permissible in a case where there is total failure of consideration. The defendant cannot however in the present circumstances deny the plaintiff the benefit the defendant has derived from the separators supplied after having used them for the purposes of the defendant's contract with Ramunia Fabricators.

[16] Accordingly the plaintiff should be paid for the separators in accordance with the terms of the supply contract. The amount allegedly owing to the

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plaintiff is USD229,850. It comprises of balance of payment as invoiced under cll 4.1(iii) and (iv) of the supply contract for USD229,500 as well as for an additional order of a bi-metal thermometer amounting to USD350.

[17] The defendant contended that the plaintiff failed to submit the final documentation required under the supply contract such as the mill certificates, design drawings, equipment data sheet, etc. In this regard, the defendant relied on the letter from Ramunia Fabricators dated 23 April 2009 to support its contention. It is a prerequisite under cl 4.1(iv) that the final 10% milestone payment is conditioned upon the submission of the final documentation. PW1 is unsure whether the final documentation had been submitted to the defendant and testified that the invoice dated 18 April 2008 nevertheless constituted the final documentation.

[18] The plaintiff strenuously argued that it was stated in that invoice: 'unless any query is received by us within 10 days from the date hereof, you will be deemed to have accepted the correctness of this account'. The defendant was accordingly obliged to respond to the plaintiff if the final documentation was lacking but the defendant failed or neglected to contemporaneously protest or point to the incorrectness of the invoice. By virtue of the defendant's failure or neglect, the plaintiff contended that the defendant is estopped from challenging on the non-submission of the final documentation by relying on the cases of *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772 and *MP Factors Sdn Bhd v Suang Yan Projects Sdn Bhd & Ors* [2007] 8 MLJ 602.

[19] Besides, the defendant by its later letter to the plaintiff dated 4 August 2008 also acknowledged that based on the defendant's account statement, the outstanding amount was USD229,500 and the defendant will make full settlement on resolution of the defendant's issues with Ramunia Fabricators. There is no mention of outstanding final documentation required from the plaintiff in the letter.

[20] In the premise I find and hold that by the written acknowledgement, the defendant has waived or is otherwise estopped from insisting for the final documentation as the condition precedent to payment against the invoice.

CONCLUSION

[21] In the result, I find and hold that the plaintiff's claim for USD229,500 is proved and is therefore payable by the defendant. The plaintiff is further entitled to the claim of USD350 arising from the additional order which has

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not been seriously challenged by the defendant at trial other than that it was for another project of the defendant. I hence order that judgment be entered in the sum of USD229,850 for the plaintiff.

[22] Based on s 11 of the Civil law Act 1956 and O 42 r 12 of the Rules of Court 2012, I further order that simple interest be paid on the judgment sum of USD229,850 at 5%pa from 2 June 2010 till realisation and costs to the plaintiff. The counterclaim of the defendant is also dismissed with costs to the plaintiff.

Claim allowed and counterclaim dismissed.

Reported by Ashok Kumar